No. 11237

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Basis of Jurisdiction.

Appellee does not question the jurisdiction of the Court.

Statement of the Case.

In accordance with the usual rule, appellee is entitled to a statement of facts in accordance with the findings of the trial court and without regard to conflicting evidence presented by appellant.

The cars in question were placed on the respective interchange tracks by the respective delivering carriers in the admitted defective condition and connected in strings or trains of cars which were not defective so as to make it impossible to move or use the nondefective cars without the movement of the defective cars.

The appellee inspected the cars on the interchange tracks, discovered the defects, and "refused to accept the cars in that condition." [R. 44, 45, 46, 47.]

The appellee disconnected the defective cars from the nondefective cars by pulling the entire train off the interchange track to its yard where switching tracks were available, did the switching necessary to separate the defective cars from the nondefective cars, and shoved the defective cars back on the interchange tracks.

The movement of the defective cars was incidental to and necessary in disconnecting them from the remaining nondefective cars and included only the minimum number of switching operations necessary to accomplish that purpose.

The method adopted by appellee to disconnect the defective cars from the nondefective cars was the most practical that could have been adopted by appellee and subjected its employees to no greater hazard than any other method which it could have adopted.

In its statement of the case, appellant says: "Appellee claims it had not accepted the defective cars." The fact is that appellant *stipulated* that appellee refused to accept these cars. [R. 44, 45, 46, 47.]

Further in the statement, appellant says: "Appellee claims" it engaged in only the incidental handling necessary to disconnect the defective cars from the nondefective cars. The whole question presented to the trial court and most of the evidence produced was on the issue as to

whether or not the admitted handling was merely incidental to disconnecting the defective cars from the nondefective cars, and the trial court found as a fact that it was necessary and incidental to this purpose on the basis of conflicting evidence; so on these points there is no longer a "claim" but a fact determined and not subject to review.

Questions Involved.

Appellant's statement of the questions involved is argumentative and incorporates questions concerning facts found adverse to it by the trial court. Stripped of these fact questions as it must be for review by this Court, only one question remains, namely: Is it permissible under the Safety Appliance Act for a receiving carrier to make the switching movements necessary to disconnect a defective car from other nondefective cars when such defective car is placed on an interchange track by another carrier, so coupled with nondefective cars as to make it impossible to use the nondefective cars without the incidental movement and switching of the defective car?

That this is the sole question remaining before this Court is indicated by a brief examination of appellant's statement of points relied on.

1. Appellant claims the court below erred in finding that appellee refused to accept the cars in their defective condition. Appellant stipulated that appellee refused to accept these cars. [R. 44, 45, 46, 47.]

2. Appellant claims the court below erred in holding the movement of cars was incidental and necessary in disconnecting them from the remaining nondefective cars and returning the defective cars. Practically the entire testimony below was directed to the question as to whether or not the movements performed were necessary and incidental; and the testimony of appellee's Witness Kingston [R. 51 to 88, incl.] amply supports the court's finding in this regard.

3. Appellant claims the court below erred in finding that only the minimum number of switching operations necessary to disconnect the defective cars was performed. This finding was based not only on the testimony of appellee's Witness Kingston [R. 62] but also on the testimony of appellant's Witness Hynds. [R. 107, 108.]

4. Appellant claims the court below erred in finding that the method of disconnection adopted by appellee was the most practical under operating conditions prevailing. This finding is abundantly supported by the testimony of Witness Kingston. [R. 55 to 88, incl.]

5. Appellant claims that the court below erred in finding that the method of disconnecting adopted by appellee subjected its employees to no greater hazard than any other possible method. The nature of the defects stipulated to were such as to subject employees to the hazard of going between cars in coupling and uncoupling and, in the one case, the use of a bent grabiron in coupling and uncoupling. Obviously, the hazard existed only at the time coupling and uncoupling was being performed and this,

of course, took place only in connection with switching movements. Since the minimum number of switching movements was made that could have been performed by any other method [Kingston, R. 62; Hynds, R. 107, 108], the trainmen were obviously not subjected to any greater hazard than they would have been subjected to by any other method of switching that might be suggested; and the court was, therefore, amply justified in making this finding.

6. Appellant claims the court erred in finding that other suggested methods of switching would subject other employees and the public to greater hazard than the method employed. This finding was, of course, not necessary to support the judgment on any theory; but, in any event, it was abundantly supported by the testimony of Witness Kingston. [R. 55 to 88, incl.]

7, 8, 9, 10 and 11. These specifications of error, except where they refer to findings of fact heretofore discussed, are addressed to the conclusions of law of the trial court and present only the one issue of law already asserted by appellee, that is, is a movement of a defective car necessary to disconnect it from nondefective cars in order to obtain the nondefective cars under the stated conditions, a permissible movement under the Safety Appliance Act?

ARGUMENT.

I.

Facts Found by the Trial Court Are Conclusive on Appeal.

Since the facts found by the trial court and complained of by appellant are supported either by stipulation of the parties or by conflicting evidence, they are not open to review by this Court. Rule 52a, *Rules of Civil Procedure,* provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

That this rule constitutes simply a reiteration of the familiar rule existing before the adoption of the Federal Rules, namely, that the findings of a trial court where based upon conflicting evidence are presumptively correct and unless some obvious error of law or mistake of fact has intervened they will be permitted to stand, is clearly held in the decision of this Court in *Wittmayer v. United States* (C. C. A. 9, 1941), 118 F. (2d) 808.

II.

The Incidental Movements of Defective Cars Necessary to Disconnect Them From Nondefective Cars in Order to Use the Nondefective Cars When Such Defective Cars Have Been Placed on an Interchange Track by Another Carrier, Coupled With Nondefective Cars, Is Not a Violation of the Safety Appliance Act.

This proposition is the fundamental proposition involved in this case and appellee contends this is the only issue before this Court. It is interesting to note the subtle manner in which the appellant has changed its position with regard to this issue, as compared with its presentation to the trial court. Actually, this proposition of law was admitted by appellant in the trial below when counsel for appellant said:

> "The incidental hauling that was necessary to disconnect the bad-order cars from the good-order cars we don't raise any question as to law in that case. The 6th and 9th circuit have passed on that, and I think they have not only laid down good law, but they have laid down good common sense." [R. 75, 76.]

Again in appellant's brief before the trial court the same statement was repeated. It will be noticed that the defendant's Answer, which was in the nature of a confession and avoidance, admitted the handling of these cars and only alleged, "that such handling * * * was the mere incidental handling necessary to disconnect the same from the cars which were not defective."

[R. 7, 8, 9, 10, 11, 12.] No motion to dismiss or any claim by other pleading that this Answer failed to constitute a defense was ever interposed; rather, the entire theory of the Government at the trial of the action was that the necessity for the switching movements should have been determined adversely to appellant. It now, at least inferentially, disclaims its admission as to the existence of this exception to the literal terms of the Safety Appliance Act and cites numerous cases to the effect that no movement of a defective car is permissible. (Appellant's Brief, p. 9.) It does not yet, however (possibly because of the inconsistency of such a position) contend that the rule heretofore stated and announced by the Sixth Circuit Court of Appeals in *Baltimore & O. S. W. R. Co. v. United States* (1917), 242 Fed. 420, and *United States v. Louisville & J. Bridge & R. Co.* (1924, 1 F. (2d) 646, and by this Court in *United States v. Northern Pac. Ry. Co.* (1924), 293 Fed. 657, is not the law but rather it attempts to distinguish those cases from the case at bar.

Appellee has not been able to discover, nor has appellant cited any cases, discussing the exact question involved in this case with the exception of the three cases cited above. All of the cases cited by appellant for its proposition that literal compliance with the Safety Appliance Act is required deal with a fact situation not in any degree similar to that presented by the case at bar, nor do the courts in any of those cases discuss by way of dicta, or otherwise, the proposition contended for in this case. Appellee's entire case is based upon the three cases cited above and the fundamental law upon which they are grounded, and is in accord with the statement of appellant's counsel made at the time of the trial before the lower court, namely,

that the courts in those cases have "not only laid down good law, but they have laid down good common sense." [R. 75, 76.] The first case to announce this exception to the harsh rule now contended for by appellant was *Baltimore & O. S. W. R. Co. v. United States* (C. C. A. 6, 1917), 242 Fed. 420, when that court made the statement quoted in appellant's brief, page 12:

> "We add that, in our opinion, in case a defective car is received from a connecting carrier in a string or train of cars, the mere incidental handling of such car by the receiving carrier, refusing to accept it, in such manner as may be necessary to disconnect it from the other cars for redelivery to the connecting carrier and to proceed with the use of the other cars, would not be a use or hauling of such defective car by the receiving carrier which would subject it to the penalties of the Act; such incidental handling of the car not being in contravention of the purposes of the Act, but a necessary step in furtherance thereof."

Appellant in its brief goes to some length to show that this quoted language was only dicta in that case. Appellant admits that this language is dicta, but simply contends that the rule stated is nevertheless sound.

This Court, in *United States v. Northern Pac. Ry. Co.* (C. C. A. 9, 1924), 293 Fed. 657, said:

> "Under the law the defendant in error was forbidden to haul this car over its lines any distance, for any purpose, because the defect arose on the lines of another carrier. * * * True, the act does not prohibit a mere incidental movement, such as a movement for the purpose of reaching other cars on the exchange track, as held in Baltimore, etc., Ry. Co. v. United States, 242 F. 420, 155 C. C. A. 196; but this was not such a movement."

It is quite apparent from the foregoing quotation itself that this Court's announcement of the exception for which we are now contending was in the nature of dicta but, dicta or not, the rule stated is not only good law but good common sense.

With respect to the last of these three cases, however, no question of dicta is involved. This case, *United States v. Louisville & J. Bridge & R. Co.* (C. C. A. 6, 1924), 1 F. (2d) 646, had to decide and did decide that incidental handling necessary to disconnect a defective car from non-defective cars in order to use the nondefective cars and return the defective one, and after such a string of cars had been placed upon an exchange track, constituted an exception to the literal language of the Safety Appliance Act. Appellant, in attempting to distinguish this case from the case at bar, reveals its purpose in its repudiation of its stipulation in the trial court to the effect that appellee refused to accept the defective cars [R. 43, 44, 45, 46, 47] in now contending that the receiving carrier in *United States v. Louisville & J. Bridge & R. Co., supra,* found the cars in its yard and merely shoved them back to the delivering carrier; whereas, appellant in this case took the cars from the line of the delivering carrier onto its own line and thereby accepted the cars. Even aside from the repudiation of the stipulation involved which should be binding on appellant here, *Brown v. Gurney* (1906), 26 Sup. Ct. Rep. 509, 201 U. S. 184, 50 L. Ed. 717, the distinction sought to be made is wholly artificial and based upon minute factual differentiation; it amounts to the difference between tweedledee and tweedledum. A brief review of *United States v. Louisville & J. Bridge & R. Co., supra,* will indicate that it is on all fours with the case at bar as far as the applicable principle of law is involved. In *United States v. Louisville & J. Bridge & R. Co., supra,*

the defective car and other cars were placed upon the terminal company's "interchange track." In the case at bar, the cars were placed upon the interchange tracks between appellee and the delivering carriers. There was no more necessity for the terminal company's handling of the defective cars in that case than there was for appellant's handling of the defective car in this case. Certainly the location of the interchange track would not change this necessity. The terminal company could have as easily foregone the use of the nondefective cars with possible damage to their contents, while waiting for the Illinois Central to come and switch out the defective cars, as appellant could have foregone the use of the nondefective cars and the possible deterioration of their contents while waiting for the delivering carriers to switch out the defective cars. As far as the movement itself is concerned, the terminal company in *United States v. Louisville & J. Bridge & R. Co., supra,* had to pull the cars off of the interchange track, a distance which does not appear, switch out the defective car, place it on some adjacent track, then some hours later pick it up with a string of other cars, shove it back on the interchange track and then beyond the interchange track for a distance, as indicated by the court's reference to the case of *Louisville & J. Bridge Co. v. United States,* 249 U. S. 534, 39 Sup. Ct. Rep. 355, 63 L. Ed. 757, "of over three-quarters of a mile, and involved crossing, at grade, three city streets once, two streets twice, one street three times, and a main track movement of at least 2,600 feet, with two stops and startings on the main track." In the case at bar, appellee merely pulled the string of cars in one continuous movement off of the interchange track back to its Mormon Yards, cut out the defective car, and in one continuous movement shoved the defective car back to the interchange track. Appellee's

movement of the defective car involved actually far less handling than the movement which was approved in *United States v. Louisville & J. Bridge & R. Co.* (C. C. A. 6, 1924), 1 F. (2d) 646.

The decision in *United States v. Louisville & J. Bridge & R. Co.,* supra, and the dicta of this Court and of the Circuit Court of Appeals for the Sixth Circuit, in the two other cases heretofore discussed and relied upon by appellee, are based upon a sound principle of statutory construction. If the Court should hold that this right of incidental handling is not permissible under the Safety Appliance statute, it would result in absurd consequences. It would mean that a carrier would be forced to permit large numbers of cars containing all manner of cargoes, perishable and otherwise, to remain standing on interchange tracks until the delivering carriers should come to switch out the defective cars, even though in so doing the delivering carriers would have to go through approximately the same type and number of switching movements as the receiving carrier would have to perform in order to use the non-defective cars. Even the literal interpretation suggested by appellant would not require such a result.

The literal application of a statute which leads to absurd consequences is to be avoided wherever possible. *United States v. Ryan,* 52 Sup. Ct. 65, 284 U. S. 167, 76 L. Ed. 224; *United States v. Katz,* 46 Sup. Ct. Rep. 513, 271 U. S. 354, 70 L. Ed. 986.

It is also true that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Church of the Holy Trinity v. United States,* 12 Sup. Ct. Rep. 511, 143 U. S. 457, 36 L. Ed. 226.

> "All statutes must be construed in the light of their purpose. A literal reading of them which would lead

to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose." *Haggar Co. v. Helvering,* 60 Sup. Ct. 337, 308 U. S. 389, 84 L. Ed. 340.

It is submitted that the exception to the literal application of the Safety Appliance Act, contended for by appellee, is supported by the only authorities in point on the question and that those authorities are well grounded in law and "based on common sense."

III.

Appellant's Contention That a Movement for One Purpose Being Unlawful, a Movement for Any Other Purpose Would Likewise Be Unlawful.

Appellant, in its brief, page 17, insists that since appellee could not have hauled the cars in question over the tracks where it did haul them for the purpose of repair, then it likewise could not haul the cars over the same tracks in an incidental movement necessary to disconnect the defective cars from the nondefective cars. This argument is appealing at first blush but has no real merit in view of the necessities of the case. There would have been no compelling necessity in the absence of the other circumstances mentioned for appellee to have hauled the cars for the purpose of repair, and such an unnecessary movement would be, therefore, in violation of the statute regardless of what tracks the movement was made over. The movement actually made, however, was made because of the necessities involved in disconnecting the defective cars from the nondefective cars, and it is this necessity which gives rise to the exception contended for, not the tracks over which the movement was made. Appellant

could just as readily contend that the defendant in *United States v. Louisville & J. Bridge & R. Co., supra,* could not be heard to say that it could make the movements necessary to disconnect and return the defective cars if it could not make the same movement for the purpose of repairing the cars. The mere fact that the same movement or even a shorter movement might be prohibited under other circumstances is no reason why such a movement should be prohibited under the necessities involved in the case at bar.

IV.

Appellant's Comments on the Opinion of the Trial Court.

It is, of course, not necessary to argue and support every comment made by the trial court in its decision, for the reason that where the decision of the trial court is correct it must be affirmed though the lower tribunal may give a wrong reason. *J. E. Riley Investment Company v. Commissioner of Internal Revenue,* 61 Sup. Ct. 95, 311 U. S. 55, 85 L. Ed. 36; *Securities and Exchange Commission v. Chenery Corporation,* 63 Sup. Ct. 454, 318 U. S. 80, 87 L. Ed. 626.

On page 21 of its brief, appellant suggests that the trial court excused appellee's actions on the basis of its good faith, which appellant says is not a sufficient excuse. Appellant overlooks the fact that the trial court had before it not only the single question of law before this Court on appeal, and which was admitted in the trial court, but that the trial court had the question of fact, first, as to whether or not the handling of the car was only incidental and necessary to its disconnection from other cars, and the additional contention made by appellant that the switching movements should be performed at some point other than

the place where they were actually performed. The comments of the court in this connction really go only to the good faith of appellee in its selection of the particular switch where the switching was to be done.

With reference to paragraph 2 of the court's opinion, appellant in its brief, page 22, cites authority supposedly for the position that the defective cars involved here were in use by appellee under the facts of the case at bar. The first of these cases, *Brady v. Terminal Railroad Assoc.*, (1938), 303 U. S. 10, 82 L. Ed. 614, was a suit for a personal injury against the carrier which had placed a defective car on an interchange track, that would have been the delivering carrier in the case at bar, and it was held that the car was in the use of the carrier which placed it on the interchange track. It is also to be noted that the same plaintiff had brought suit against the receiving carrier, that is, the one who would have been in the same position as the appellee in this case, and that suit was lost, it being held that the receiving carrier was not using the car in question; so that appellant's citation of authority bolsters the trial court's suggestion (made by way of inducement only) that the car in question was in the use of the delivering carriers and not this appellee. The other cases cited by appellee on this point, that is, *Chicago Great Western R. R. v. Schendel* (1925), 267 U. S. 287, 69 L. Ed. 614; *Minneapolis, St. Paul & S. S. Marie Ry. v. Goneau* (1926), 269 U. S. 406, 70 L. Ed. 335; *Cusson v. Canadian Pacific Ry.*, 115 F. (2d) 430, all involve cases of cars becoming defective on the line of the carrier involved, except the last case and that was one in which a defective car on another line was being used in switching movements not involving the defective car.

Appellant attacks the trial court's opinion, paragraph 4, in its brief, pages 23, 24, and 25, on the theory that there

is no room for any construction of the Safety Appliance Act other than the harsh and literal construction contended for by appellant. The argument of the court in this paragraph and the authorities which it cites are authorities directed toward the basic proposition that an absurd or unreasonable result should not be arrived at and that a statute should be open to construction as well as interpretation. The arguments of the court in this regard are in effect a discussion of fundamental principles leading to the acceptance of the principles announced in *United States v. Northern Pac. Ry. Co., supra; United States v. Louisville & J. Bridge & R. Co., supra;* and *Baltimore & O. S. W. R. Co. v. United States, supra,* and as such are not detracted from by appellant's citations of the same list of cases cited at the beginning of its argument (App. Br. p. 9) requiring, under other circumstances and in the absence of the necessities involved in the case at bar, literal compliance with the statute.

Appellant attacks paragraph 5 of the court's opinion, page 25 of its brief, for having suggested that Congress intended some leeway when it enacted section 13 of the Safety Appliance Act relating to repair, and wherein the trial court comments that judicial discretion is involved to determine where the nearest available point is and what a reasonable movement consists of. Appellant apparently has entirely misconstrued the purpose of the trial court in mentioning these considerations. Appellee believes that the court was simply using this by way of analogy to show that some judicial discretion is involved in the application of any statute, some discretion over and above that which appellant contends is completely and entirely vested in "the executive officers." It is true that judicial discretion would be involved in applying section 13 of the Safety Appliance Act to enable a court to determine whether or not a fact

situation came within section 13; and, likewise, judicial discretion must be exercised in the case at bar to determine whether or not the facts in this case. where no repairs are involved, bring it within the spirit and meaning of the prohibitions contained in the Safety Appliance Act. It is at this point that appellant belatedly takes the position that the receiving carrier has no remedy but to sit and wait until the delivering carrier comes and switches out the defective cars, and by taking this position appellant now repudiates its own statement of the law as made to the trial court, repudiates the three cases upon which appellee relied in the trial court, that the trial court relied upon in its opinion, and which appellee continues to rely upon in this Court, namely, *United States v. Louisville & J. Bridge & R. Co., supra; United States v. Northern Pac. Ry. Co., supra;* and *Baltimore & O. S. W. R. Co. v. United States, supra.*

On pages 26, 27 and 28 of its brief, appellant complains about the trial court's mention of the wartime conditions under which the alleged violations occurred. This mention, of course, would in no manner be necessary to support the judgment of the court. However, it would seem entirely proper to mention the extremely difficult conditions under which appellee was operating not in order to change the Safety Appliance Act nor to announce any new or different rules of law, but rather that the necessities of the case as contended for by appellee were real and not imaginary. In this portion of its brief, the Government again emphasizes the distance of the movement of the cars involved. This, seemingly, is the factor which appellant continually complains about. In fact, the length of the movement involved bears no relation whatever to the purposes of the Safety Appliance Act, which is admittedly

for the purpose of protecting railroad employees from injury. During any or all of the time that these cars were in motion, coupled together as a train, they presented no hazard whatever to railroad employees. If any hazard at all was involved, it was involved at such times as employees might be engaged in uncoupling the defective cars and thereby going between them. If appellant reasonably thought that more hazard was involved in the movement performed in this case than might be involved in some other movement, its contention would have been that the appellee made more than the necessary number of switching moves with the cars, thereby increasing the number of couplings and uncouplings to be made, and increased thereby the hazard to employees. This it cannot do, either under the facts or under the findings of the trial court, and yet it insists that a dangerous precedent is involved because of the movement of the cars for less than a mile in either direction. The distance involved is of no bearing whatever.

On page 27 of appellant's brief, appellant again reiterates that there is no room for any reasonable or practical construction of the literal terms of the statute and, on page 28 of the brief, appellant contends that the thread of inconvenience runs through the case and is the basis for the trial court's decision. In order to understand these references by the trial court to matters of reasonableness, inconvenience, etc., it is necessary to again notice the manner in which the issues were presented to the trial court. In the first place, the Government had agreed that incidental movements were permissible. [R. 75, 76.] It then attempted to show that the switching movements should have been performed at some switch nearer the transfer tracks than the Mormon Yard in order to make out its

case that the movements involved were not merely incidental. Appellee's position then was that the incidental movements, if performed in accordance with reasonable operating practices involving no more switching movements than would be performed at the switches designated by appellant, would be in accordance with the agreed principle of law that incidental movements are permissible. Once having admitted the existence of the exception and as soon as it was ascertained that the switching movements involved represented only the minimum number necessary to accomplish the permitted object, then the selection of the particular switch where the movements were to be performed should be left to determination under operating conditions existing and the Government should not be permitted to say that the necessary and incidental switching should have been performed at some other switch. Once the movements appear to be within the exception, some choice in the manner of their performance must be allowed; otherwise, the Government could always contend that the switching should have been performed at some other switch, just as it did in this case. The court's references to the operating conditions, reasonableness, convenience, etc., all relate to this question of appellee's choice of the point where the necessary switching was to be performed, not the question as to whether or not necessary switching incidental to disconnecting defective cars from nondefective cars is permissible under the statute. The court's opinion amounts simply to this: First, it is permissible to make the switching movements necessary to disconnect the defective cars on the authority of the three cases heretofore discussed and under the general principles of statutory construction. Second, the switching movements performed by appellee were only the minimum num-

ber of movements necessary to perform this permitted objective. Third, appellee's choice of the place where this switching should be done came not only within the requirements of the necessities of the situation but in addition was reasonable and practical under the circumstances existing.

Conclusion.

The announced principle of law that a carrier may perform switching movements necessary and incidental to reaching and using nondefective cars when they are placed upon a transfer track by another carrier, coupled with defective cars, is well supported by reason and authority; that the movements performed in the case at bar were incidental and necessary to such disconnection, has been determined by the trial court on the basis of stipulations and conflicting evidence, and is, therefore, not reviewable by this Court, and it, therefore, follows that the decision of the trial court should be affirmed.

Respectfully submitted,

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